No. 89-1416

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

AIR COURIER CONFERENCE OF AMERICA,
Petitioner,
v.
AMERICAN POSTAL WORKERS UNION, AFL-CIO,
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
and UNITED STATES POSTAL SERVICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF RESPONDENTS AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, FOR LEAVE TO FILE A REPLY BRIEF, AND REPLY BRIEF

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Respondents Ameican Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, have filed a motion to dismiss the writ of *certiorari* for lack of jurisdiction. The petitioner and federal respondent have filed briefs in opposition. Rule 21 of the Court does not expressly provide for reply briefs. The Union respondents respectfully request leave to file this reply brief, to answer points advanced in the briefs in opposition which were not addressed in our motion, par-

ticularly the applicability of *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297 (1983).

Respectfully submitted,

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TABLES OF AUTHORITIES

REPLY BRIEF

In our motion to dismiss we showed that, as in *Diamond v. Charles*, 476 U.S. 54, 63-64 (1986), the Postal Service's "failure to invoke [the Court's] jurisdiction leaves the Court without a 'case' or 'controversy' between the [Unions] and the [Postal Service]." ACCA and the Postal Service respond by insisting that ACCA has standing to complain to this Court over the court of appeals' remand order. None of their supporting arguments have merit.

1. The government, in its effort to distinguish *Diamond v. Charles*, asserts that the key difference between these cases is that Dr. Diamond was attempting to preserve state criminal sanctions against physicians who perform abortions, while ACCA is here "seeking to uphold a regulation lifting the criminal sanctions otherwise applicable to the conduct of its members by creating an exception to the scope of a criminal law." USPS Br. at 4.

The first problem with this argument is that there is *no* reason to believe that ACCA's members' current activities are in violation of the criminal law. The Justice Department itself has taken the opposite view. Putting that aside, the government's argument fails to appreciate that ACCA's *interest* in the regulation does not substitute for the requirement of showing that ACCA is threatened with immediate *injury*, which would permit the association to petition. See also ACCA Br. at 9-10. Although ACCA might feel more apprehensive of prosecution under the "urgent letter" rule without the new remail rule, apprehension alone has never sufficed for standing. See *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.7 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions" (emphasis in original).).

2. The government and ACCA rely on *Director, Office of Workers' Compensation Programs v. Perini North*

River Associates, 459 U.S. 297 (1973), for the proposition that each party below may petition the Court. USPS Br. at 2, ACCA Br. at 5. On this point *Diamond*, a decision issued after *Perini*, and a decision which squarely addresses the issue of appellant-intervenor standing, controls this case. *Diamond* holds that mere party status does not suffice; that case expressly specifies that a petitioner must establish the existence of a case or controversy, and "cannot ride 'piggyback' on the [government's] undoubted standing . . ." when the government fails to petition. 476 U.S. at 64.[1] *Diamond* thus decided a standing issue that had not been definitively resolved by the Court in *Perini* (459 U.S. at 305).

3. If, contrary to our belief, the foregoing does not suffice, it is our submission that *Perini* is, in any event, distinguishable. First, the concept of "injury" is not applicable to a governmental body's inherent right to litigate the correct interpretation of the laws it is commissioned to administer. Governmental agents and agencies hardly ever suffer injury in the same sense that private litigants who are adversely affected by agency action do. In this critical respect, governmental litigants differ from private citizens who have no right to sue simply to see to it that the law, properly interpreted, is obeyed. See *Diamond*, 467 U.S. at 66; *cf. United States v. Federal Deposit Ins. Corp.*, 881 F.2d 207, 209 (5th Cir. 1989), cert. denied, 110 S.Ct. 1118 (1990). Viewed in this light, the Director of OWCP in *Perini* had standing to challenge the court of appeals erroneous construction of the Longshoremen's and Harbor Workers' Compensation Act, even though a private party would not have standing.

Second, although couched as a "standing" question, Perini's real contention was that section 21(c) of the Longshore Act, 33 U.S.C. 921(c), prevented OWCP

[1] The *Diamond* majority does not mention *Perini*.

(which administers the statute) from seeking Supreme Court review of a contrary decision of the Department of Labor's Benefits Review Board. See *Perini*, 459 U.S. at 302 n.9. In essence, Perini was contending that an agent of the Department of Labor was precluded from litigating legal issues already decided by an adjudicatory body within the same department. This claim has nothing to do with the standing issue presented in *Diamond*.

Finally, because Perini controverted the claim for compensation which the OWCP found was required under the statute, there clearly existed a case or controversy between the Director and Perini when the Director petitioned for *certiorari*. This is precisely the critical factor absent in ACCA's case, as we show directly below.

4. Contrary to ACCA's contention (ACCA Br. at 5), the association had no standing when it filed its petition for *certiorari* because it could not demonstrate the existence of a case or controversy involving any respondent *at the time of its petition*. The Postal Service had failed to petition, and ACCA had no power to continue this case on its own. ACCA was not then (and is not now) aggrieved by the Postal Service's final rule. The Unions' continuing disagreement with the Postal Service over whether the remail rule meets the section 601(b) "public interest requires" standard was (and is) a justiciable controversy, but *not* between ACCA and the Unions.[2]

This point is illustrated by the fact that ACCA could not have successfully maintained a declaratory judgment action against the Postal Service and the Unions over the

[2] Even this controversy did not come into existence until the government filed its brief on the merits as respondent in support of the petitioner. ACCA is therefore incorrect when it states that the case-or-controversy was preserved by the Postal Service's filing of its brief. ACCA Br. at 5. There needed to be a justiciable dispute at the time of the petition for the Court to possess jurisdiction. See *Diamond*, 476 U.S. at 62-64.

validity of the rule. ACCA has no dispute with the Postal Service; such a "friendly suit" would be dismissed forthwith. See 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3530 (2d ed. 1984). Furthermore, ACCA could not sue the *Unions alone* over the validity of the rule; such an action would be dismissed for failure to join the Postal Service. See 7 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1617 at 245 (2d ed. 1986) (government is an indispensable party when "judgment cannot be rendered without affecting [its] interest. . . .").

The government speculates that ACCA could face a threat of injury by the possibility of a direct civil action by the Unions under the PES against ACCA members. USPS Br. at 6-7. This theoretical injury is *not* alleged by ACCA. ACCA Br. at 9-10.[3] Even had ACCA made this contention, this asserted "threat" could not sustain a declaratory judgment action, and cannot sustain a *certiorari* petition. The mere possibility that the Unions might sue ACCA's members does not amount to a present threat of concrete injury. See 10A C. Wright, A. Miller & M. Kane, *Federal Practice Procedure* § 2757 at 586-587 (even if arguably unlawful conduct occurs, standing absent when "the other party may not challenge it"); compare *id.* at 596-597 (cases justiciable when litigation is "imminent" or "inevitable").[4] A declaratory judgment

[3] ACCA expresses concern about being subject to searches and seizures by the Postal Inspection Service. *Id.* But all businesses are subject to such inspection. There is no reason to believe that the Inspection Service will harass ACCA's members with unwarranted inspections in light of the Justice Department's ruling that their operations are lawful. See *Los Angeles v. Lyons*, 461 U.S. at 102.

[4] Contrary to the government's contention (Br. at 6-7), ACCA has no reason to believe that the Unions will sue. This rank speculation takes no notice of the fact that the Unions did not sue ACCA's members prior to the adoption of the remail suspension or make any ACCA member a defendant in this case. ACCA itself does not assert that the association is specifically worried about Union suits. See ACCA Br. at 10.

action against the Unions on this basis would simply seek a declaration that ACCA has a meritorious defense in an action by the Unions (should the Unions ever bring one), and would therefore be precluded by the cases requiring a live, present controversy. *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990); see Unions' Motion at 11 and 15 n. 12, citing authorities.

ACCA's interests are "abstract," even within the analysis of the *Diamond* concurrence (476 U.S. at 75), because all its members' current operations have repeatedly been declared by the Department of Justice to be lawful. "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis*, 110 S.Ct. at 1253 (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). The only contrary argument—that prosecutors can change their minds (USPS Br. at 5)—does not convert this into a live controversy.[5] The cases make it clear that justiciability must be judged on *present* circumstances. See *Whitmore v. Arkansas*, 110 S.Ct. 1717, 1723 (1990) ("[I]njury must be concrete in both the qualitative and temporal sense.").

5. Because *Perini* rested entirely on the petitioner's concession that the Director was a proper respondent in the court of appeals,[6] see *Diamond*, 476 U.S. at 72 (O'Con-

[5] Noting that the Unions relied on "statements in the administrative record" (Br. at 5), the government implies that the Department of Justice's position that remail was lawful was not official policy. However, the position was certainly official; it was specifically quoted by the Postal Service itself as the reason for its proposed 1985 regulation to clarify the "urgent letter" rule. 51 Fed. Reg. 21,929 (June 17, 1986), J.A. 66-67. Likewise, ACCA's assertion that the Department's position could "vary based on the facts" (Br. at 12 n.8) is immaterial, given the obviously general terms of the Department's pronouncement that international remail operations were lawful under the "urgent letter" rule.

[6] Plaintiff Cunningham named the Director, the Benefits Review Board, Perini (the employer) and the employer's insurance company

nor, J., concurring); *Perini*, 459 U.S. at 304, it has little relevance to this case.[7] The Unions have made no such consession as to the appropriateness of the district court's order allowing ACCA's permissive intervention.[8] Although the Unions did not oppose ACCA's intervention, the issue may be raised now because "it bears on whether a justiciable controversy is presented in this Court." 476 U.S. at 74 (O'Connor, J., concurring). Thus ACCA's waiver argument and its reliance on Supreme Court Rule 15.1 are misplaced. ACCA Br. at 6-7.[9]

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as respondents. The Longshore Act permits review of the final decision of the Board (see 33 U.S.C. 921(c)), and it was the Board's decision of which he was aggrieved, regardless of who the nominal respondents were.

[7] Even when tested against the standards for permissive intervention under Fed. R. Civ. P. 24(b)(2) standards—the applicability of which the *Diamond* Court left open (476 U.S. at 68 and n.21) and which neither the government nor ACCA argue must be considered here—ACCA was not a proper intervenor. A theoretical suit to enjoin remail operations as violative of 18 U.S.C. 1696, prohibiting private carriage of letters, would not "shar[e] common questions of law or fact with those at issue in this litigation." *Diamond*, 476 U.S. at 77. The issue in such a suit would be whether the defendants met the "cost" or "loss of value" test of the "extremely urgent letter" rule, which would permit them to carry letters out of the mails. The issue in this case is whether the remail suspension meets the public interest standard of PRA section 601(b).

[8] See Motion at 16 n.14.

[9] *City of Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958), relied on by ACCA for the proposition that an intervenor *can* have standing to defend a city ordinance (Br. at 10 n.6), is easily distinguished. There, the city petitioned for a writ of *certiorari*, which petition was granted before the Court considered the standing of Parmalee (an intervenor on the side of the defendant) to appeal. Further, Parmalee's threatened injury—total loss of its business to another company—was undisputed. Here, ACCA's members face no threat of injury from the failure to adopt the remail rule.

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September, 1990